Supreme Court, U.S
FILED

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No. ____

In the Supreme Court of the United States

JAMES LI

Petitioner,

v.

COUNTY OF LOS ANGELES,
MICHAEL JUDGE,
RONALD BROWN

Respondents

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. In the context of a multi-tiered public employment hiring process, when unlawful discrimination and retaliation by a lower-level official at a lower-tier precludes the injured applicant from advancing further in the multi-tiered process, does the final decision-maker's lack of wrongfulness forecloses all 42 U.S.C. §1983 remedies to the injured applicant?

II. Does evidence of a public employer's consideration of race as a factor in hiring, motivated by the desire to achieve ethnic and cultural diversity in the workforce, inherently raise a triable issue of material fact as to whether a rejected applicant's 14th Amendment equal protection right has been violated and whether the applicant has a remedy under 42 U.S.C. §1983, without regard to the applicant's race and ethnicity?

If not, does additional evidence of lack of individualized consideration of non-racial diversity factors make a difference in the answer?

If not, does additional evidence of Asian-American over-representation in the workforce, coupled with above evidence, raise a triable issue of material fact as to whether a rejected Asian-American applicant's 14th Amendment equal protection right has been violated?

LIST OF PARTIES

PETITIONER

James Li

RESPONDENTS

County of Los Angeles
Michael Judge
Ronald Brown

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals affirming granting respondents' motion for summary judgment (App., *infra,* 3a-11a) is unreported. The opinion of the district court (App., *infra*, 12a-17a) is unreported, which was incorporated in the order granting defendants' motion for summary judgment (App., *infra*, 18a-19a).

JURISDICTION

The court of appeals' judgment was entered on August 14, 2006. A timely petition for rehearing was denied on October 13, 2006 (App., *infra*, 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 1st Amendment to the Constitution provides in relevant part: "..no law … abridging the freedom of speech, … or the right of the people … to petition the government

for a redress of grievances." The Equal Protection Clause of the 14th Amendment of the Constitution provides, "No state … shall deny to any one within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 provides in relevant part: "Every person who … subjects, or causes to be subjected, any citizen of the United States … to the deprivation of any rights … secured by the Constitution .. shall be liable to the party injured in an action at law, suit in equity…". And 42 U.S.C. § 1985(3).

STATEMENT

Resolving all evidentiary conflicts in light most favorable to the petitioner, the non-moving party in a motion for summary judgment, arrives at the following factual statement of the case.

In July, 2000, the petitioner, an Asian-American, applied for the entry-level Deputy Public Defender I position

with Los Angeles County Office of the Public Defender ("LAPD"), and took a civil service examination in conjunction therewith. (App., *infra.*, 4a). The civil service examination was administered by respondent Ronald Brown, a member of the executive management of LAPD, and Noman Koplof, a veteran supervising deputy public defender at LAPD.

At the beginning of the petitioner's so-called civil service examination, the petitioner made a prepared statement concerning racial discrimination at LAPD, found by the 9th Circuit to be protected speech along with plaintiff's previous civil right suits against respondent Brown, (App., *infra*, 9a, footnote 2). Shortly thereafter, in response to the petitioner's inquiry, respondent Brown stated that for purpose of achieving ethnic and cultural diversity, (App., *infra.*, 20a:14-20), the " 'executive management [of LAPD] takes race and ethnicity into consideration as a factor' in hiring", (App., *infra.*, 6a:18-7a:2).

The so-called civil service examination proceeded with the petitioner being asked to respond to legal hypotheticals, and plaintiff responded very well. Norman Koplof formed the opinion that the petitioner demonstrated an ability, particularly in legal discussion and communication skill, to be significantly better than the average of the 500 and more deputy public defenders under his supervision over the span of 32 years. (App., *infra.*, 21a-24a)

The Los Angeles County ordinance mandated the civil service examination to engage in a holistic, individualized evaluation of an applicant's education, training, experience, general ability and personal fitness, and compare the qualifications of an applicant to those of other applicants to identify the best qualified applicants to advance to the next stage of the employment process. The comparison is accomplished through assigning the applicant a civil service examination score. In this case, the next stage

of the employment process is consideration for appointment by respondent Judge, the Chief Public Defender, (App., *infra.,* 15a:8-13).

Respondent Brown purposefully suppressed petitioner's civil service examination score in three ways: 1) giving a score calculated to average down Norman Koplof's favorable evaluation of the petitioner's ability to preclude the petitioner from being advanced further and making false entry about the petitioner's performance in order to justify it, (App., *infra.*, 25a:6-8), 2) not complying with County policy of giving Norman Koplof, new to the process, proper orientation so that the same standard applied to other applicants is used in evaluating the petitioner's qualification, and 3) misleading Koplof to believe that his sole task was to evaluate the plaintiff's response to legal hypotheticals, instead of a holistic, individualized evaluation of many factors as called for by the Los Angeles County ordinance governing the civil service examination.

Because the petitioner's score was suppressed, the petitioner was never invited for interview for consideration by respondent Michael Judge. The petitioners sued respondents under 42 USC § 1983 and 42 USC § 1985(3) for race, ethnicity discrimination and First Amendment retaliation in the administration of the civil service examination and conspiracy in furtherance of unlawful discrimination, causing the petitioner to lose employment opportunity. The respondents used the petitioner's purported low score as the legitimate reason for respondents Judge and Los Angeles County's decision to not hire the petitioner, and moved for summary judgment for all respondents, including respondent Brown.

The Trial Court's Opinion.

The trial court determined that absent direct evidence of discrimination, when there is a legitimate reason for respondent Los Angeles County, acting through respondent Judge, to not consider hiring the petitioner, the petitioner is

not entitled to any relief under 42 USC § 1983. App., *infra.*, 13a:12-14a:15. The trial court then granted respondents' motion for summary judgment to all respondents on all claims on the ground that petitioner had not rebutted the assertion that the petitioner's civil service examination score was not high enough for him to be even considered for being hired, notwithstanding evidence that the petitioner in fact did very well on the civil service examination and evidence that respondent Brown engaged in fabrication and conducts and omissions calculated to suppress the petitioner's score. The district court also cited as support for its decision statistical evidence that Asian-Americans fared better than all other racial groups in the hiring process. App., *infra.*, 15a:14-16a:15.

The Court of Appeal's Decision.

The 9th Circuit affirmed the lower court decision, though acknowledging its decision and the trial court's decision being drawn on the basis of analogy with a U.S.

Supreme Court case based on Title VII of the Civil Rights Act of 1964. App., *infra.* 5a. With respect to the Equal Protection claim, the 9th Circuit ruled that respondent Brown's admission that LAPD's executive management takes race and ethnicity into consideration in hiring is a "stray remark" not relevant on issue of discriminatory intent because it is not inherently biased against Mr. Li. App., *infra.*, 6a:17-7a:8. The appellate court's opinion ignored evidence that respondent Brown intentionally suppressed petitioner's civil service examination score or caused it to be suppressed. App., *infra.*, 7a:9-8a:9.

With respect to the First Amendment retaliation claim, the 9th Circuit held that because petitioner's low score disqualified him from being considered by respondent Judge for hiring, the causal connection between the petitioner's protected speech and the ultimate adverse hiring decision was severed. App., *infra.*, 10a:4-11a:13. The appellate court's opinion ignored evidence that respondent Brown

intentionally suppressed petitioner's civil service examination score and petitioner's low score was caused by respondent Brown's conduct. App., *infra.*, 9a: 14-11a:13.

REASONS FOR GRANTING THE PETITION

I. Circuits are Divided over Whether Lawfully Motivated Adverse Action by Government Officials in the Last Link of Chain of Events Precludes a Claim Based on 42 U.S.C. § 1983.

The decision below creates a conflict in the circuits over whether when a government official in the last link of chain of events ending up with adverse consequence to the citizen acts with lawful motive, the citizen is precluded from seeking remedy under 42 U.S.C. § 1983 for the unlawfully motivated actions of other government officials in a prior link of chain of events. In contrast to the 9th Circuit, the Third Circuit held that the action of a faultless official in the last link of a chain of events resulting in injury to the citizen are just a causal conduits for unlawfully motivated prior officials to inflict civil right injury to the citizen, and do not

affect the citizen's ability to seek remedy under 42 U.S.C. § 1983 against officials who had acted with unlawful motive in the prior links of the chain of events. See *Fagan v. City of Vineland*, 22 F.3d 1283, 1292 (3rd Cir. 1994).

II. The Decision below Reflects a Need for Clarification on Applying The Court's Title VII Opinions as Precedents for Actions Arising from Equal Protection Clause and 42 U.S.C. § 1983.

In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), this Court "assume[d] that the *McDonnell Douglas* framework is fully applicable to racial-discrimination-in-employment claims under 42 U.S.C. § 1983." *Id*, at 506 (underline added). The Court left undecided whether *McDonnell Douglas* framework, constructed on the basis of §703(a)(1) of Title VII of the 1964 Civil Rights Act, is fact fully applicable to all racial-discrimination-in-employment claim under 42 U.S.C. § 1983 without qualifications. This question must be answered because even in cases based on Title VII of the 1964 Civil Rights Act, the *McDonnell Douglas* framework had been the subject of recurring

litigation before the U.S. Supreme Court for clarification. See, e.g., *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed. 2d 957 (1978); *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed. 2d 207 (1981), *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). Without answering that question, *St. Mary's Honor Center* assumption will likely to cause confusion to judges and lawyers alike in claims under 42 U.S.C. § 1983 as the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), opinion once did in claims under 42 U.S.C. § 2000e-2, the official code citation of the §703 of Title VII of the 1964 Civil Rights Act.

Moreover, 42 U.S.C. § 1983, enacted after the Civil War with its companion statute, 42 U.S.C. § 1981, is a

congressional statute that attests to "our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin," *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 174, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989), and "a firm national policy to prohibit racial ... discrimination", *Bob Jones University* v. *United States*, 461 U.S. 574, 593 (1983). Although predating Civil Rights Act of 1964 by nearly 100 years, with regard to race discrimination in public employment, 42 U.S.C. § 1983 is not made redundant by Title VII of the Civil Rights Act of 1964 as amended because it is a part of the post-Civil War civil right statutes giving the civil right victims the power to seek remedies immediately without going through Title VII's "elaborate administrative procedure" designed to promote "the resolution of claims through conciliation rather than litigation", *Patterson*, 180-181. In *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989) (overturned by statutory amendment on other grounds), this Court held that the *McDonnell Douglas*

framework applies without qualification to racial-discrimination-in-employment claims under 42 U.S.C. § 1981. *Id.*, 186; 2377-2378. The time is ripe to address whether *McDonnell Douglas* framework is fact fully applicable to all racial-discrimination-in-employment claims under 42 U.S.C § 1983 without qualifications because 42 USC. § 1983 remains a pillar of civil rights remedies to address race discrimination in public employment and is the only remedy for vindication of other important civil rights, such as free speech.

This Court's guidance is also needed because the assumption in *St. Mary's Honor Center* creates a tension with this Court's ruling in *Regents of University of California* v. *Bakke*, 438 U.S. 265 (1978). In *Bakke*, Justice Powell states that "Title VI [, a companion title to Title VII in the Civil Rights Act of 1964,] ... proscribes only those racial classifications that would violate the Equal Protection Clause". *Id.*, 287. It logically follows that a 42 U.S.C. §

1983 action to enforce the Equal Protection clause would provide remedy to all intentional discriminatory actions proscribed by Title VII. But *McDonnell Douglas* opinion addresses only one provision of Title VII, 42 U.S.C. § 2000e-2(a)(1), not other provisions addressing other intentional conducts made unlawful by Title VII. This case reflects a need to clarify whether *St. Mary's Honor Center* and *McDonnell Douglas* opinions together can reasonably be interpreted as stating for the proposition that while a victim of unlawful discrimination in a screening test for public employment can seek remedy under 42 U.S.C. §2000e-2(a)(2)[1], 42 U.S.C. § 1983[2] provides no remedy to him.

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[1] *See* 42 U.S.C. § 2000e-2(a), the formal code citation to §703(a)("It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire ... any individual ... because of such individual's race, ... or national origin; or (2) to limit, segregate, or classify ... applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities ... because of such individual's race, ... or national origin.").

[2] *See* 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, ... subjects, or causes to be subjected, any citizen of

III. The Decision Below Reflects a Need for Guidance as to the Circumstances under Which Race-Conscious Practice May Violate the Equal Protection Rights of Members of Racial Groups Purportedly Favored by the Race-conscious Practice.

In *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), and *Gratz v. Bollinger*, 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003), this Court held that whenever a government takes race and ethnicity as a factor in distributing opportunities, the government's action must satisfy strict scrutiny, which requires the consideration of race to serve a compelling governmental interest other than race balancing and the methods be narrowly tailored to serve the compelling governmental interest. In all previous Equal Protection cases addressed by this Court, there was no ambiguity that the plaintiffs were members of the racial groups disfavored by the race-conscious practice at issue.

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the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ...").

The Court has never addressed the question whether a member of a purportedly favored racial group may challenge the constitutionality of a race-conscious practice, nor the question whether a member of a disfavored minority may challenge the constitutionality of a race-conscious practice that could be used in that minority's favor.

Those questions are of national importance because this country is "an increasingly diverse ... society", *Grutter*, 330. This case presents an opportunity to address those questions.

IV. The Decision Below Reflects A Need For Clarification of *Mt. Healthy City Sch. Dist. Bd of Educ. v. Dole*, 429 U.S. 274 (1977), and the Extent of Protection Afforded by the First Amendment for Protected Speech in the Context of Public Employment.

Another constitutional issue of national importance that recurs in litigation is First Amendment rights and protection thereof against governmental curtailment through retaliation in public employment against speakers for making

protected speech. In *Mt. Healthy City Sch. Dist. Bd of Educ. v. Dole*, 429 U.S. 274 (1977), this Court held that in that case if the same adverse hiring decision would have been made without regard to the applicant's protected speech, there is no First Amendment violation. This Court's guidance as to what constitute an adverse hiring decision and legitimate reasons severing causal connection between protected speech and adverse employment action is needed because hiring by a public employer is almost always a process involving multiple stages with different governmental officials performing discreet roles and civil right is "an area of the law in which standards of causation are already complex," *Burlington Northern & Santa Fe Railroad Co. v. White*, 126 S. Ct. 2405 (2006) (Justice Alito, concurring).

The nation's need for more guidance from the Court's in this area of law is demonstrated in two rulings in retaliation issues in the October Term 2005. In the October Term 2005, this Court provided clarification on determining

the scope of protected speech. See *Garcetti et al.* v. *Ceballos*, 126 S. Ct. 1951 (2006). This Court also provided clarification on what conducts constitute unlawful retaliation for speech protected in Title VII of the Civil Rights Act of 1964. See *Burlington Northern & Santa Fe Railroad Co. v. White*, 126 S. Ct. 2405 (2006) (interpreting Civil Rights Act of 1964, Title VII §704(a), formally codified as 42 U.S.C. § 2000e-3(a)[3]). As in race-discrimination-in-employment situation, the Court's guidance is also needed on how Title VII retaliation cases are applicable to retaliation claims under 42 U.S.C. § 1983.

V. The Decision Below Is Incorrect

A. The Courts Below Erred In Mechanically Applying the *McDonnell Douglas* Framework, Resulting in Curtailing 42 U.S.C. § 1983 Remedies Against Race Discrimination.

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[3] 42 U.S.C. § 2000e-3(a)("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment … because he has opposed any practice made an unlawful employment practice by [Title VII]…")

The trial court and 9th Circuit decisions are based on the assumption that the *McDonnell Douglas* framework in its entirety is the law governing racial-discrimination-in-employment claims under 42 U.S.C. § 1983. That assumption unduly restricts civil rights remedy provided under 42 U.S.C. § 1983 because *McDonnell Douglas* framework was based on § 703(a)(1) of the Civil Rights Act of 1964, consisting of a *prima-facie* case component specifically applicable to § 703(a)(1) situation and burden-shifting component building upon the *prima-facie* case component based on § 703(a)(1), and the petitioner's case if filed as a Title VII case would be based on § 703(a)(2), which prohibits discrimination in differently enumerated activities, such as application screening. Applying the *McDonnell Douglas* framework mechanically to race-discrimination-in-employment claim under 42 U.S.C. § 1983 would effectively curtail civil right remedy for race-discrimination-in-employment under 42 U.S.C. § 1983 to

activities enumerated under § 703(a)(1) of Title VII, a result at odd with the plain language of 42 U.S.C. § 1983.

B. The Court Below Erred in Imposing upon a Minority Member an Additional Burden to Provide Separate Corroboration of "Being Biased Against" in Order to Challenge Race-Conscious Practices.

Even if the petitioner's race, being an Asian-American, is generally favored by LAPD's race-consciousness practice, the petitioner can still be harmed individually because of his race if the race-conscious practice is not narrowly tailored to serve the compelling governmental interest justifying the race-conscious practice. If diversity is the compelling governmental interest, the petitioner can be harmed constitutionally by the race-conscious practice when the practice is unconstitutional because it fails to take non-racial factors of diversity into consideration. Hence, the admission of a race-consciousness practice by a public employer or its employment decision-maker inherently raises a genuine issue of material fact as to whether a person is unlawfully discriminated against,

regardless of his race. The Court below erred in imposing upon the petitioner the additional burden of separate corroboration that his race was disfavored in the race-conscious practice. Moreover, evidence of ethnic diversity being the objective of the race-conscious practice and over-representation of Asian-Americans together tend to support the claim that the race-conscious practice is biased against Asian-Americans because the practice seeks to achieve ethnic diversity through limiting the number of Asian-Americans being hired.

C. The Court Below Erred in Limiting Its Inquiry on Retaliatory Action Only at the Last Tier of A Multi-Tier Employment Process.

According to the lower courts' logic, 42 U.S.C. §1983 remedies can be circumvented by using a screening stage to engage in unlawful discrimination to produce an ostensibly legitimate basis for the final decision-maker to rely on in his final decision. This logic totally frustrate the reasoning behind protection against retaliation of protected

speech: that a person engaging in constitutionally protected conduct "is placed in no worse a position than if he had not engaged in the conduct", *Mt. Healthy City Sch. Dist. Bd of Educ.*, 285-286.

D. **The Courts Below Erred in Overlooking 42 U.S.C. §1983's Provision for Remedies other than Monetary Damages.**

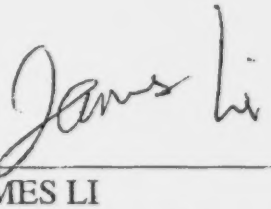
Even if the petitioner cannot prove he would have been hired and would be entitled to monetary damage, he is still entitled under 42 U.S.C. §1983 for equitable relief, such as injunction against retaliation against him in his future application for employment, or injunction that the practice of considering race as a factor be stopped in future hiring practice. The courts below erred in throwing out the petitioner's entire action, though 42 U.S.C. §1983 provides remedies in addition recovery of money (" … shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress,…").

CONCLUSION

The petition for a writ of certiorari should be granted because this case presents an opportunity to more fully develop civil rights law relating to freedom of speech and freedom from invidious discrimination.

Respectfully submitted.

December 22, 2006



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UNITED STATES COURTS OF APPEALS

FOR THE NINTH CIRCUIT

JAMES LI, Plaintiff – Appellant, v. COUNTY OF LOS ANGELES, et. al., Defendant - Appellees	No.05-55967 D.C. No. CV-01-00543-RMT Central District of California, Los Angeles ORDER

Before: SKOPIL, FARRIS, and FERGUSON, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and recommends denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and petition for rehearing en banc are denied.

FILED
OCT 13 2006
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES LI,	No.05-55967
Plaintiff – Appellant,	D.C. No. CV-01-00543-RMT
v.	
COUNTY OF LOS	MEMORANDUM*[1]
ANGELES, et. al.,	
Defendant - Appellees	

Appeal from the United States District Court
For the Central District of California
Robert M. Takasugi, District Court Judge, Presiding

Submitted April 6, 2006**[2]

Before: SKOPIL, FARRIS, and FERGUSON,

Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

In July 2000, Plaintiff James Li, an Asian-American, applied for the entry-level Deputy Public Defender I ("DPD I") position with the Los Angeles County Office of the Public Defender. Li took a Civil Service Examination ("CSE") in conjunction with his application, but was ultimately not hired for the position. Li subsequently sued the County of Los Angeles and his CSE examiners (the "Defendants") under 42 U.S.C. §§ 1983 and 1985(3) alleging race discrimination in hiring in violation of the Fourteenth Amendment, and retaliation in violation of the First Amendment. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

A district court's grant of summary judgment is reviewed de novo. *Walker v. City of Lakewood*, 272 F.3d 1114, 1122 (9th Cir. 2001). We view the evidence in the light most favorable to the nonmoving party in determining whether there are any genuine issues of material fact and whether the

district court correctly applied the relevant law. *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000).

I.

Li's first claim is that the Defendants engaged in intentional discrimination in violation of the Fourteenth Amendment in rejecting him for the position of DPD I. Absent direct evidence of discriminatory intent, a plaintiff may establish a prima facie case of intentional discrimination by meeting the four prongs of the *McDonnell Douglas* test. See *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973).[1] Once the plaintiff establishes a prima facie case, a rebuttable presumption shifts the burden of production to the employer to articulate

[1] Under McDonnell Douglas, the plaintiff must show that (1) he is a member of a protected class, (2) he was qualified for the position, (3) he was rejected despite his qualifications, and (4) other equally or less qualified members who were not of the protected class were hired. Though this test is most frequently invoked to access claims of intentional discrimination brought under Title VII of the Civil Rights Act of 1964, it is equally applicable to claims of intentional discrimination brought pursuant to the Fourteenth Amendment. See *Lowe v. City of Monrovia*, 775 F.2d 998, 1010-11 (9th Cir. 1985).

some legitimate, non-discriminatory reason for its decision. *Id.* The burden then shifts back to the plaintiff to prove that the employer's state reason is merely pretextual. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-08 (1993). To show pretext, the plaintiff must do more than restate the prima facie case – he "must produce specific facts either directly evidencing a discriminatory motive or showing that the employer's explanation is not credible." *Lndahl v. Air France*, 930 F.2d 1434, 1438 (9th Cir. 1991).

Here, the Defendants have met their burden of articulating a legitimate, non-discriminatory reason for their decision not to hire Li – Li's low score on the CSE disqualified him under the Civil Service Rules from being considered for the DPD I position. The burden now shifts back to Li to show specific evidence of pretext, which Li fails to do. First, Li cites statements allegedly made by one of his examiners to the effect that "executive management

takes race and ethnicity into consideration as a factor" in hiring. Granting all inferences in favor of Li, these statements do not indicate that the Defendants were racially biased against him. At best, these statements constitute "stray remark" insufficient to raise a triable issue of material fact. See *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438-39 (9th Cir. 1990).

Li also attempts to show pretext by claiming that the CSE itself was discriminatorily administered. Li cites the late substitution of an examiner onto his interview panel, and the fact that he was not asked general questions regarding his background, as evidence of the Defendants' discriminatory intent. However, the record reflects that it is standard practice to substitute panelists when one of the original examiners becomes unavailable, and that posing general background questions is neither a required, nor a necessary, component of the CSE.

Rather, it seems CSE examiners are permitted to assess an applicant's qualifications by examining the applicant's resume and by posing hypothetical problems. In Li's case, his resume was properly submitted to the Defendants and he was asked hypotheticals just the same as other applicants. In short, Li's allegations that his CSE was improperly administered is unsupported by the record, and as such fails to constitute evidence of pretext.

Finally, Li argues that hiring policies that pre-dated his interview by four to six years constitute relevant evidence of the discriminatory nature of Defendants' decision not to hire Li in July 2000. The record, however, reflects that the policies Li cites ceased being operative long before Li's interview in 2000. These historic policies therefore fail to raise a triable issue of fact regarding whether the Defendants' 2000 decision not to hire Li is merely

pretextual. We therefore uphold the District Court's grant of summary judgment.

II.

Li's second claim is that the Defendants' decision not to hire him was in retaliation for the prepared statement he delivered at the beginning of his examination, and for previous lawsuits that he filed against the Defendants. In order to establish a prima facie case of retaliation, an employee must show that (1) he engaged in protected speech; (2) the defendants took an "adverse employment action" against him; and (3) the speech was a "substantial or motivating factor for the adverse employment action." *Thomas v. City of Beaverton*, 379 F.3d 802, 808 (9th Cir. 2004). While Li meets the first two prongs of this test,[2] he fails to set forth specific

[2] Li's prepared statement and lawsuits concerned claims of racial discrimination, which are matters of public concern and therefore protected speech. See *Thomas*, 379 F.3d at 808-09; *Connick v. Myers*, 461 U.S. 138, 146 (1983). Because Li was not hired for the position of DPD I, he also satisfied the second

evidence of a causal connection between his exercise of free speech and the Defendants' decision not to hire him.

In determining whether the plaintiff's speech was a substantial or motivating factor for the adverse employment action, courts examine three principle factors: (1) proximity in time between the protected speech and the alleged retaliation; (2) the employer's expressed opposition to the speech; and (3) other evidence that the reasons proffered by the employer for the adverse employment action were false or pretextual. *Keyser v. Sacramento Unified School Dist.*, 265 F.3d 741, 751-52 (9th Cir. 2001). Applying these factors to Li's case, we conclude that Li failed to raise a triable issue as to whether his prepared statement, or his prior lawsuits against the

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prong of the test – showing that he "suffered a loss of any government benefit or privilege." *Ulrich v. City of San Francisco*, 308 F.3d 968, 977 (9th Cir. 2002).

Defendants, were a substantial or motivating factor in the Defendants' decision not to hire him.

For the reasons discussed in the previous section, Li has failed to rebut the Defendants' exceedingly persuasive justification for their decision not to hire him. Li's inability to at least partially sever the causal connection between his inadequate performance on the CSE and the Defendants' subsequent decision not to hire him is fatal to his attempt to show that his prepared statement or previous suits were the actual "substantial or motivating factor" in the Defendants' adverse employment decision.

For the foregoing reason, the District Court's grant of summary judgment is **AFFIRMED**.

FILED
AUG 14 2006
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

JAMES LI,	)	
	)	
Plaintiff,	)	Case No. CV-01-0
	)	0543-RMT(Ex)
v.	)	
	)	
COUNTY OF LOS ANGELES, MICHAEL JUDGE, RONALD BROWN, RONALD WHITE	)	MEMORANDUM
	)	
Defendants	)	
	)	

This matter has come before the court on the motion of defendants County of Los Angeles, Michael Judge, Ronald Brown and Ronald White for summary judgment or, alternatively, for an order specifying the facts that appear without substantial controversy. Having considered the pleading and other papers filed herein the court issues this

memorandum in lieu of finding of fact and conclusions of law.

Plaintiff James Li brings this action alleging that defendants have discriminated against him based on race and ethnicity and retaliated against him "for exercising his First Amendment right to freedom of speech and access to court to address issue of public concern," in violation of his right under 42 U.S.C. §§ 1983, 1985(3) of the Civil Rights Act and the Fourteenth Amendment of the United States by failing to hire plaintiff.

Absent direct evidence of discrimination, a prima facie case under 42 U.S.C. § 1983 requires proof that (1) plaintiff is a member of a protected class, (2) qualified for the position, (3) but not selected for the position and (4) that the position remained open and was ultimately filled by one who is not a member of the protected class. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

Once a prima facie case is established a presumption of discrimination arises, which defendants can rebut by setting forth evidence of a legitimate nondiscriminatory reason for the adverse employment action. Thereupon it is plaintiff's burden to demonstrate that the nondiscriminatory reason is a pretext for discrimination. Defendants contend that, assuming plaintiff could establish a prima facie case, they can rebut the presumption of discrimination with evidence of a legitimate non-discriminatory reason for not hiring plaintiff. Defendants' asserted reason for not hiring plaintiff is that his performance on the Civil Service Examination ("CSE") did not place him in a high enough band to render him eligible for consideration.

Plaintiff alleges that he, a male of East Asian parentage, applied for an entry level public defender position with the Los Angeles County Office of the Public Defender and participated in the CSE

interview on July 12, 2000. Plaintiff was interviewed by Norman Koplof and defendant Ronald Brown. Defendant Brown gave plaintiff a score of 86 and Koplof gave plaintiff a score of 84, giving plaintiff a final score of 85 out of a possible 100 points. The score of 85 placed plaintiff in Band Three of the eligible register.[1]

Pursuant to Civil Service Rules, when Chief Public Defender, defendant Michael Judge, selects an individual to fill a vacancy, he is permitted to only consider those applicants in the highest ranking band having at least five persons, or in any other higher band.

In 2000, 215 applicants participated in the CSE interview for the entry level public defender attorney position, including 130 (60.5%) White

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[1] Pursuant to Civil Service Rule 11.01(C), the eligible register is a list of qualified prospects organized according to the following bands: (1) Band One ranges from 94.5 to 100; (2) Band Two ranges from 88.5 to 94.4, (3) Band Three ranges from 82.5 to 88.4 and (4) Band Four ranges from 76.5 to 82.4.

applicants, 23 (10.7%) Black applicants, 28 (13%) Hispanic applicants and 26 (12.1%) Asian-Pacific Islander applicants. Of the 215 applicants, 181 scored higher than 85; no applicant scored in Band One, 170 applicants scored in Band Two and 11 applicants scored higher than plaintiff in Band Three. Additionally, of these 181 applicants, 62% were White, 10% were Black, 15% were Hispanic, and 10% were Asian-Pacific Islander. During 2000, a total of thirty-five applicants were hired to fill entry level positions; twenty (57.1%) Whites, four (11.4%) Blacks, four (11.4%) Hispanics, and seven (20%) Asian-Pacific Islanders. Because plaintiff placed in Band Three, he was not even eligible for consideration.

Defendants have provided evidence to establish the above facts, which evidence has not been controverted by plaintiff. Plaintiff has failed to provide any evidence that defendants' asserted reason

for not hiring plaintiff is a pretext for discrimination or that defendant's actions were in retaliation for plaintiff's exercise of his First Amendment right to freedom of speech and/or access to the courts.[2] As such, summary judgment is warranted.

Dated: March 10, 2005

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Sr. Judge

FILED
MAR 10 2005

[2] Defendants have raised several objections to plaintiff's evidence, which the court declines to reach because even considering the evidence plaintiff presents, he fails to controvert defendants' asserted justification for not hiring him, that asserted justification being plaintiff's failure to place high enough on the CSE to render him eligible for consideration. Plaintiff presents no evidence relevant to show that the asserted justification is a falsehood or a cover up for discrimination.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

JAMES LI,	)	
	)	
Plaintiff,	)	Case No. CV-01-0
	)	0543-RMT(Ex)
v.	)	
	)	
COUNTY OF LOS ANGELES, MICHAEL JUDGE, RONALD BROWN, RONALD WHITE	)	ORDER GRANTING SUMMARY JUDGMENT
	)	
Defendants	)	
	)	

This matter having come before the court on the motion by defendants County of Los Angeles, Michael Judge, Ronald Brown and Ronald White for summary judgment or, alternatively, for an order specifying the facts that appear without substantial controversy, and this court having issued a memorandum concurrently herewith.

IT IS ORDERED that the motion by defendants for summary judgment is granted.

Judgment shall issue forthwith.

Dated: March 10, 2005

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Sr. Judge

FILED
MAR 10 2005

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A. Yes.
Q. When?
A. Is in the July 2000 interview.
Q. What did he say?
A. He basically was saying that I complained too much.
Q. That's what he said?
A. Well, that's the summary of what he said.
Q. And what did that have to do with your race?
A. Well, he basically was suggesting that I was unjustifiably taking the advantage of the result of the civil rights struggle of African-Americans.
Q. What words did Mr. Brown say to you in July of 2000, if you can recall?
A. Yes, he -- he said that the executive management have decided to incorporate race and ethnicity in order to achieve an ethnic and culturally diverse population in the public defender's office.
Q. What else did he say?
A. Well, he asked me -- he told me that if you -- basically, he told me that if you don't like it, then you should not apply.
Q. What did you say to him to bring up this

A. Probably somewhere between 500 and -- somewhere in that area, I guess, that would be a rough estimate.

Q. Of those 500 or so trial lawyers that you supervise, there were some Asian-American attorneys, right?

A. Yes.

Q. Were there Asian-American attorneys who spoke English as a second language?

A. I don't know.

Q. Were any Asian-American trial attorneys speaking English with an accent?

A. I can't recall.

Q. Do you know if any of them could speak another language fluently?

A. I don't know.

Q. In the 32 years working at the public defender's office, have you ever had a chance to observe an Asian-American deputy public defender trying a case?

A. Yes.

Q. How many occasions?

A. Dozens. I'd say 10 to 20, maybe, maybe more.

Q. Do any of these Asian-American attorneys whose trial you had an opportunity to observe speak English with an accent?

A. I don't recall.

Mr. Adolfo Lara and Ronald Brown?

A. I don't think I knew that back in 2000. It's my understanding from the pleadings that that's the case.

Q. When do you find out for the first time Mr. Brown and Mr. Lara were the regular interview panels?

MS. PETIT: I'm going to have to object that it lacks foundation.

But you can answer.

THE WITNESS: I think that I was aware of the fact that Mr. Brown did interviewing, and I probably became aware of that in 2000. I don't think I was aware of the fact that Mr. Lara was doing interviewing until I read the pleadings.

BY MR. LI:

Q. Before interviewing Mr. Li, did anyone discuss with you what considerations should be taken in the interview?

A. No.

Q. When do you find out that you had this assignment to interview Mr. Li?

A. Just a few minutes before the interview began.

Q. Who told you that? Who told you the assignment?

A. Mr. Brown.

Q. Was Mr. Brown your supervisor?

A. Yes, I believe so.

Q. Did Mr. Brown tell you what you should be looking for in an interview?

A. I don't have any current recollection about the substance of my conversation with Mr. Li -- I'm sorry, my conversation with Mr. Brown before beginning the interview with Mr. Li.

Q. Did anyone show you a sample interview?

A. No.

Q. Were you given a list of questions for the interview?

A. No.

Q. Were you given a list of sample answers for the interview?

A. No.

Q. Do you know when Mr. Brown start working at the public defender's office?

A. No.

Q. When did you first meet Mr. Brown?

A. I don't know.

Q. Do you have an estimate?

A. No.

Q. Was he ever under your supervision?

A. Not that I recall. I don't think so.

Q. When did Mr. Brown become your supervisor?

A. My best recollection it was at the beginning of

And I think when I gauged Mr. Li's performance, I was comparing his levels of response to a matrix, based upon my experience with numerous other lawyers. His scores were based upon his answers, but whether they rated -- where they fell was based upon my feeling of how he compared to the lawyers I had dealt with, taking into consideration that they had weeks or months of experience in the courtroom that he didn't have.

Q. Now, can you explain to me your last sentence? What do you mean, based upon months and weeks of court experience that Mr. Li did not have?

A. Well, the attorneys in the public defender's office had worked as public defenders for some period of time, so they had some experience that Mr. Li did not have and I would not -- and I took that into consideration, but, for example, I wouldn't hold a person who is a candidate for employment to have a knowledge of criminal law, but you would expect him to be able to issue spot and identify issues, even though he didn't know the express legal consequences of those issues. So that's what I mean by, "comparing."

Q. Is it fair to say that your score was based on Mr. Li's ability to identify issues?

A. In part, yes.

Q. What else was it based on?

you came from an economically disadvantaged background?

A. No, I never felt that way, no. I never felt that way. I never expressed it that way.

Q. Can you tell me what else you don't agree with here.

A. This following sentence, "When asked for a closing argument, he could not do so."

Now, that is totally make up.

Q. Why is that totally made-up?

A. Because there was no question that calls for closing argument.

Q During this interview, were you asked to give a closing argument based on some type of scenario about a, you know, imaginary client you were representing?

A. No.

Q. Do you recall if you were asked any hypotheticals in this interview?

A. Oh, yes.

Q. Were you asked more than one?

A. I was asked series of hypotheticals with follow-up questions.

Q. Do you recall what they were, just briefly?

A. Okay. Now, the first question was, I represent a defendant charged with a hate crime, and the defendant was white, and on the day of the trial I went past a parking